Foo Lan Foow & Anor v Kamisah bte Abdul Hanis (as the wife and dependant of Rahman bin Ismail, deceased)

HIGH COURT (PULAU PINANG) — CIVIL APPEAL NO 12–237 OF 2001
KAMALANATHAN RATNAM J
23 APRIL 2004

Civil Procedure — Appeal — Road accident — Credibility of witnesses — Serious contradiction of witnesses' evidence — When appellate court could interfere with findings of trial judge

This was an appeal by the widow ('the plaintiff/respondent') of the pillion rider who died ('the deceased') in a motor accident when the deceased and the rider's motorcycle collided into the first defendant's ('DW1') motorcar which occurred at the junction of Jalan Anson/Jalan Nirvana. The sessions court judge had accepted DW1's version that it was a rear collision as correct, and found DW2 and DW3 as credible witnesses of the first defendant. She dismissed the plaintiff's claim without even assessing damages. Hence, the appeal against the decision of the trial judge.

Held, allowing the appeal:

(1) It is trite law that an appellate court will not interfere with the findings of a trial judge more so when the latter had had the benefit of seeing and hearing the witnesses and assessing their ability to tell the truth. The court will also not interfere with the apportionment of blame as long as there was no error of law or of fact in the judgment of the lower court. However, the appellate court will interfere and disturb the finding of fact by the trial judge if crucial evidence had been misconstrued resulting in the uncertainty of one party's evidence and the consistency of the other party's evidence being disregarded (see para 9); *Multar v Lim Kim Chet & Anor* [1982] 1 MLJ 184 followed.

(2) The learned judge found as a fact and as conceded to by the parties, that the collision occurred at the junction, not 50ft away. This discrepancy in DW1's evidence was neither explained by DW1 nor considered by the learned judge. This evidence certainly tallied with the evidence of the motorcyclist who said that the driver of the car suddenly swerved into his path, although he maintained, and correctly so, that this swerving occurred at or near the junction. Therefore, the failure of the sessions court judge to consider this vital discrepancy was reason enough for the High Court to interfere (see paras 12–13).

(3) The sessions court judge found DW2 and DW3 as credible witnesses and therefore it was necessary to analyse their evidence. DW1 said that her speed all along was between 10–15mph and DW2 said that his speed was 25–30mph. It would have been impossible for him to have been following DW1's car for five minutes and yet see it for the first time, only 60ft away. Further, if he had been following the said car for five minutes (assuming this was true) then since his speed was faster than the snail's speed of DW1, surely he would have gone well past DW1 even before DW1 had arrived at the fateful junction. DW2's evidence

also clearly contradicted the daughter's (DW3) evidence that her father (DW2) had stopped with her at the BP Station to see what was happening. If she could remember all the details relating to the accident, how was it that on this one issue she deferred materially from the evidence given by her father. These serious contradictions ought to have been considered by the learned sessions court judge. With all these nagging doubts, it was wrong of the learned sessions court judge to have found DW2 and DW3 as credible witnesses (see paras 14–18).

[**Bahasa Malaysia summary**

Ini adalah rayuan oleh balu ('plaintif/responden') pembonceng penunggan yang telah meninggal dunia ('si mati') dalam satu kemalangan motor apabila si mati dan penunggang motorsikal bertembung dengan kereta defendan pertama ('DW1') yang berlaku di simpang Jalan Anson/Jalan Nirvana. Hakim mahkamah sesyen telah menerima versi DW1 bahawa ia merupakan kemalangan dari tepi sebagai betul, dan mendapati DW2 dan DW3 sebagai saksi-saksi DW1 yang boleh dipercayai. Beliau telah menolak tuntutan plaintif tanpa menaksir ganti rugi. Justeru itu, rayuan telah dibuat terhadap keputusan hakim perbicaraan tersebut.

Diputuskan, membenarkan rayuan tersebut:

(1) Adalah undang-undang lapuk bahawa mahkamah rayuan tidak akan campur tangan dengan penemuan hakim perbicaraan lebih-lebih lagi jika beliau telah meneliti dan mendengar saksi-saksi dan menilai keupayaan mereka memberi keterangan benar. Mahkamah juga tidak akan campur tangan dengan pembahagian kebersalahan asalkan tiada kesilapan undang-undang atua fakta dalam penghakiman mahkamah bawahan. Namun begitu, mahkamah rayuan akan campur tangan dan mengganggu penemuan fakta hakim perbicaraan jika keterangan penting telah disalah tafsir sehingga mengakibatkan keterangan satu pihak tidak jelas dan tidak mengambilkira kekonsistenan keterangan pihak satu lagi (lihat perenggan 9); *Multar v Lim Kim Chet & Anor* [1982] 1 MLJ 184 diikut.

(2) Hakim yang bijaksana mendapati pada hakikatnya dan seperti yang disetujui oleh pihak-pihak, bahawa perlanggaran tersebut berlaku disimpang tersebut, bukan 50 kaki dari situ. Percanggahan dalam keterangan DW1 tidak dijelaskan oleh DW1 maupun dipertimbangkan oleh hakim yang bijaksana. Keterangan ini selari dengan keterangan menugggang motorsikal yang menyatakan bahawa pemandu kereta tersebut tiba-tiba membelok masuk ke jalannya, walaupun beliau menegaskan, dan dengan betul, bahawa belokan tersebut berlkau di atau dekat simpang tersebut. Oleh itu, kegagalan hakim mahkamah sesyen untuk mengambilkira percanggahan penting ini cukup menjadi sebab untuk campur tangan Mahkamah Tinggi (lihat-perenggan-perenggan 12–13).

(3) Hakim mahkamah sesyen mendapati DW2 dan DW3 sebagai saksi-saksi yang boleh dipercayai dan oleh itu adalah perlu untuk menganalisa keterangan mereka. DW1 mengatakan bahawa kelajuan beliau sepanjang

jalang adalah antara 10–15bsj dan DW2 mengatakan bahawa kelajuan beliau adalah 25–30bsj. Adalah mustahil untuk beliau mengikuti kereta DW1 selama lima minit tetapi hanya melihatnya untuk kali pertama, hanya 60 kaki dari itu. Tambahan pula, jika beliau telah mengekori kereta tersebut selama lima minit (dengan andaian ini benar) maka memandangkan kelajuan beliau adalah lebih laju daripada kelajuan rendah DW1, pastinya beliau telah memotong DW1 sebelum DW1 tiba ti simpang tersebut. Keterangan DW2 juga dengan jelas bercanggah dengan keterangan anak perempuannya (DW3) bahawa bapanya (DW2) telah meninggalnya diStesyen BP untuk melihat apa yang berlaku. Jika beliau dapat ingat semua butiran mengenai kemalangan tersebut, bagaimana persoalan satu ini beliau bezakan secara material dengan keterangan yang diberikan oleh bapa beliau. Percanggahan yang serius tersebut sepatutnya dipertimbangkan oleh hakim mahkamah sesyen yang bijaksana. Dengan semua keraguan tersebut, adalah salah untuk hakim mahkamah sesyen yang bijaksana memutuskan DW2 dan DW3 sebagai saksi-saksi yang boleh dipercayai (lihat perenggan-perenggan 14–18).]

Notes

For cases on credibility of witnesses, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 657–677.

Cases referred to

Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor [1992] 1 MLJ 1 (refd)
Multar v Lim Kim Chet & Anor [1982] 1 MLJ 184 (folld)
Uval & Anor v Zainal [1970] 1 MLJ 74 (refd)

Ponnusamy Pillai (Haniff & Chew) for the appellants.
CK Dasaratharaj Pillai (VP Nathan & Partners) for the respondent.

Kamalanathan Ratnam J:

The facts

[1] This is a straight forward running down case. The plaintiff/respondent is the widow of the pillion rider who died in the said motor accident. On 7 July 1997 at about 7.30pm, the rider of the motorcycle PDH 9698 with the deceased as a pillion was riding along Jalan Anson which was a one way road from the direction of Jalan Macalister towards the direction of Jalan Perak.

[2] The rider testified that as he was proceeding about 3–4ft from the left edge of the road from the direction of north to south a motorcar No PDH 9698 which was ahead of him suddenly and without warning cut across his path from the left to the right with the intention of entering into Jalan Nirwana. The said motorcar did not give any signal before cutting across his path. Because he braked and swerved to the left, he was able to avoid colliding into the off side of the said car. However, he collided into the rear offside of the

said car. He denied the defence suggestion that the said car was indeed on the right lane and had indicated with a signal its intention to turn right.

[3] The first defendant ('DW1') who was the driver of the said motorcar lodged a police report in which she said that as she neared the junction leading to Jalan Nirwana, she gave her signal with the intention of turning right when suddenly she was collided into by the motorcycle coming from her rear.

[4] In her evidence-in-chief, she gave this same evidence except that at the same time, she had also looked through her rear view mirror and on seeing no vehicles coming from the rear, she turned right when she was suddenly collided into from the rear by the motorcycle. She was then about 5ft from the right edge of the road and about 50ft from the junction she was turning into. She denied the rider's version of the accident. Her speed all along had been 10–15mph.

[5] The first defendant called DW2 as her next witness. DW2 testified that he had been following the first defendant's car for five minutes before the accident occurred. His speed then was between 25–30mph and he was riding 4–5ft from the left edge of the road. Then he says that the first time he saw the defendant's car, he was 60ft away and the car was on the right lane. Suddenly, a motorcycle overtook him on his right at such speed and so close to him that he almost lost control of his motorcycle. He saw this motorcycle again cutting to its right and colliding into the defendant's car. The motorcyclist had swerved either because he had no time to brake or that he was trying to overtake the car. He could not tell if DW1 had the indicator on.

[6] The first defendant then call DW3 the daughter of DW2, a young girl of 17, who testified that she was riding pillion on her father's motorcycle when it was overtaken by the deceased's motorcycle which then collided into the defendant's motorcar which at that moment was stationary and at a diagonal position. Under cross-examination, she admitted that the defendant was her father's friend.

Finding of the High Court

[7] In this case, the learned sessions judge had reproduced the same judgment twice. On 8 June 2000 when parties appeared before her, she read out her judgment in which she found as a fact that the said accident had occurred at the junction of Jalan Anson/Jalan Nirvana. She also accepted the defendant driver's version that it was a rear collision as correct, and found DW2 and DW3 as credible witnesses. She found them credible 'by virtue of their consistency with regard to material particulars pertaining to the accident'. She disbelieved the motorcyclist's evidence when he said that the collision was at the right rear of the car. The learned sessions court judge was of the view that if the rider's version was to be accepted, the collision ought to have been on the right side of the body of the car and not at the rear as the damages appeared to be. She therefore dismissed the claim without even assessing damages.

[8] Subsequently when an appeal was filed, she reproduced her earlier judgment verbatim but dated it as 1 June 2001. Fortunately, she had merely reproduced word for word her earlier judgment. Otherwise, I would have been

compelled to reject the second judgment since she was already functus officio when she read out her written judgment on 8 June 2000. As it is, I shall be referring only to her judgment dated 8 June 2000.

[9] It is trite law that an appellate court will not interfere with the findings of a trial judge more so when the latter had had the benefit of seeing and hearing the witnesses and assessing their ability to tell the truth (see *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1 (SC)). The court will also not interfere with the apportionment of blame as long as there was no error of law or of fact in the judgment of the lower court (see *Uval & Anor v Zainal* [1970] 1 MLJ 74).

[10] However, the appellate court will interfere and disturb the finding of fact by the trial judge if crucial evidence had been misconstrued resulting in the uncertainty of one party's evidence and the consistency of the other party's evidence being disregarded (see *Multar v Lim Kim Chet & Anor* [1982] 1MLJ 184 (FC)). I reiterate what I had said in my book *Nathan on Negligence* (1998 Ed) at p 376. It reads as follows:

> The circumstances in which it is open to an appellate court to reverse the findings of a trial judge based on credibility of the witnesses who have given evidence at the trial are limited. But when a trial judge has so manifestly failed to derive proper benefit from the undoubted advantage of seeing and hearing witnesses at the trial and in reaching his conclusion has not properly analysed the entirety of the evidence which was given before him, it is the plain duty of the appellate court to intervene and correct the error lest otherwise the error result in serious injustice. An appellate court will interfere with the findings of a trial judge, even if he had found that the claimant's evidence was consistently given throughout the various stages of the examinations before the court and the defendant's evidence was not consistent and was full of contradictions so long as the appellate court determines that the claimant's story was inherently improbable.

[11] Having set the law, I now look at the facts which the trial judge had failed to consider.

[12] Firstly, the first defendant driver said in evidence-in-chief that as she neared the junction leading to Jalan Nirvana, she gave her right signal, looked at the rear-view mirror, saw no vehicle, and turned to the right. She was then 50ft from the junction. She was then suddenly collided into by this motorcyclist. However, the learned judge found as a fact and as conceded to by the parties, that the collision occurred at the junction, not 50ft away. This discrepancy in DW1's evidence was neither explained by DW1 nor considered by the learned judge.

[13] To my mind, this evidence certainly tallies with the evidence of the motorcyclist who said that the driver of the car suddenly swerved into his path, although he maintained, and correctly so, that this swerving occurred at or near the junction. It is my judgment that the failure of the sessions court judge to consider this vital discrepancy is reason enough for this court to interfere.

[14] Secondly, the sessions court judge found DW2 and DW3 as credible witnesses. It is therefore necessary to analyse the evidence of those two so called credible witnesses. Firstly, DW2 said he was following DW1 for five

minutes. Yet the first time he saw the said car was when he was only 60ft from the said car. Even though DW1 said that her speed all along was between 10–15mph and he had said that his speed was 25–30mph, it would have been impossible for him to have been following DW1's car for five minutes and yet see it for the first time, only 60ft away. This is an inherently incredible story. Secondly, if he had been following the said car for five minutes (assuming this is true) then since his speed was faster than the snail's speed of DW1, surely he would have gone well past DW1 even before DW1 had arrived at the fateful junction. Thirdly, he was on the left lane and the rider of the motorcycle rode so close to him that he almost lost his balance. The key and sketch show A-Al, which is one half of the one way road as being 7.6m (about 27ft) wide. The left hand of the road on which both DW2 and the rider were proceeding on was A1-A2 whose width as shown on the key and sketch was 6.9m (about 24ft). According to this witness, at this time, he was 4–5ft from the left edge of his road. Even assuming the plaintiff's rider had 24-(5+1)=18ft of space on his own half of the road. Now, as shown earlier, the other half of the road on which DW1's car was, was 27ft wide. The question why would the plaintiff's rider who was 18ft on his road and a further 27ft on the other side of the road, swerve into DW1's path and collide into the car. It does not stand to logic. Since DW1's car was already at the junction, the plaintiff's rider could have easily passed DW1's car even from within his own 18ft space. According to DW2, the plaintiff's rider swerved either because he had no time to brake or that he was going to overtake the car. But this cannot be so since the said rider had 18ft of empty space to manoeuvre his motorcycle, unless he wanted to commit suicide. And yet the sessions court judge found this witness's testimony credible.

[15] As for DW3, she testified that after she saw the accident her father made a turn and stopped at the BP Station to see what was happening. There her father had told her that DW1 was the boss of the Caltex Station along that road. Neither she nor her father went to the scene to render assistance. Only then her father took her to the tuition centre. Further whilst riding pillion, she was able to exactly tally with her father's evidence that his speed was 20–25kph and that they were riding 4–5ft from their left edge of the road.

[16] However, DW2 her father testified that as soon as the accident had occurred, he proceeded on his journey to leave his daughter at the tuition centre since he saw a lot of people running to render assistance and besides, he was running late to send his daughter to the tuition centre. After sending her to the tuition centre, he had to return the same way and he saw DW1 standing by herself at the scene. This evidence clearly contradicts the daughter's evidence that her father had stopped with her at the BP Station to see what was happening. If she could remember all the details relating to the accident, how is it that on this one issue she deferred materially from the evidence given by her father.

[17] Whilst I agree this contradiction does not relate to matters prior to, or at the time of the accident, yet this serious contradiction ought to have been considered by the learned sessions court judge. If after considering this she had ruled that this was not a serious contradiction to have affected her credibility, this court would not have commented on this issue. However since the lower

court had failed to consider and give due weight to this material contradiction, I do not think the learned sessions court judge was right in holding her as a credible witnesses.

[18] Further, she was 17 years old and was seated as pillion and yet she was able to say that the speed of the motorcycle was 20–25mph. She did not even lead evidence that she could ride a motorcycle to be in a position to self-assess the speed of the motorcycle ridden by her father. With all these nagging doubts, it was wrong of the learned sessions court judge to have found DW2 and DW3 as credible witnesses.

[19] In the circumstances, I allowed the appeal and set aside the judgment of the lower court dismissing the plaintiff's claim. I found the defendants negligent to the extent of 50%, with the rider of the motorcycle in which the deceased rode as a pillion, being liable 50% himself from the evidence adduced. However, since the plaintiff in the case before me was the widow of the pillion, I ruled that she ought to succeed on 100% basis since no third party proceedings were taken out against the rider of the motorcycle in which the deceased was riding pillion, nor did the defendants apply to join the said rider as a co-defendant.

[20] Although the defendants had initially appealed even against quantum although the said sum was not even assessed by the lower court, and there was therefore no basis for such an appeal, the parties had, prior to this appeal before me, agreed to the sum of RM64,000 as loss of dependency and RM10,000 as a claim for bereavement with the usual interest at 4% on both awards from date of accident to date of judgment. I therefore made such an order and awarded the plaintiff the costs both here and below.

Appeal allowed.

Reported by Ezatul Zuria Azhari